FEDERAL COMMUNICATIONS COMMISSION

Washington D.C.

WT Docket No. 19-270

City of Fountain Valley's Comments to the Petition of WISP
Seeking a Declaratory Ruling on the Denial of a Conditional Use Permit

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Office of the Secretary

Wireless Telecommunications Bureau

CITY OF FOUNTAIN VALLEY'S
COMMENTS TO PETITION FOR DECLARATORY RULING

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INTRODUCTION

Rodecker-Slater's wireless facilities were never intended to serve as consumer-end equipment. Rodecker-Slater, and its multitude of corporate persona, are in business to make money. They provide wireless service to the public for compensation. They are seeking, though this Petition, a competitive advantage over all other wireless providers by avoiding the City's legitimate zoning regulations at the expense of community aesthetics. The Commission should not countenance such abuse of its OTARD rule.

STATEMENT OF FACTS

Fountain Valley Promotes Community Aesthetics

Fountain Valley ("City") has maintained strong aesthetic regulations throughout its history. Pursuant to both constitutional zoning authority and express authorization of Section 332 of the Telecommunications Act, the City regulates the aesthetic impacts of wireless telecommunication facilities. Those regulations "ensure that the installation of wireless communication facilities will not be detrimental to the city's public health, safety or welfare" and mitigate aesthetic impacts by requiring screening, stealthing, and architectural compatibility. (Fountain Valley Municipal Code ("FVMC") § 21.28.010.)

The City has consistently and uniformly enforced its wireless regulations, which have been followed by all wireless carriers since the City's Ordinance was adopted in 1997; except Petitioner.

Petitioner Installed a 40-foot, 3-post, Unscreened, Incompatible, Wireless Tower

Rodecker-Slater's wireless facility is located on the roof of a three-story office building. The mast on top of the roof is a 3-post, 40-foot, triangular-shaped, metal Rohn tower supported by three (3) Guy lines. (Declaration of Matt Jenkins ("Jenkins Dec.") ¶ 4.) From ground level, the tower reaches a height of 68 feet. (Jenkins Dec. ¶ 4.) The tower has seven (7) antennas and dishes installed at the top and is highly visible from public streets. (Jenkins Dec. ¶ 4; Exhibit 1.)

Mr. Rodecker's declaration details a sophisticated, complex array of multi-party, for-profit business transactions that took this wireless facility from a single-post antenna to its current 3-post, Rohn tower, multi-antenna configuration.

As stated in his declaration, Mr. Rodecker is a partner of Rodecker-Slater, LLC. (David Rodecker Declaration in Support of Petition for Declaratory Relief ("Rod. Dec.") ¶ 3.) In 2004,

Mr. Rodecker created "Relevant Ads, Inc." to provide business marking and online services. (Rod. Dec. ¶ 4.)

In 2014, Rodecker-Slater acquired a three-story office building in Fountain Valley. (Rod. Dec. ¶ 5.) Relevant Ads became a tenant. (Rod. Dec. ¶ 6.) Rodecker-Slater installed a 40-foot monopole and NanoBeam receiver on the roof.

In 2016, Mr. Rodecker created the company "Server-ISP" to provide server hosting and Information Technology services. (Rod. Dec. ¶ 7.)

In January 2017, Rodecker-Slater installed the current 40-foot, 3-post, Rohn tower with a PowerBeam radio reception device. (Rod. Dec. ¶ 8.) In April 2017, Server-ISP purchased and installed an Ubiquiti AM-M-V5G-Ti radio on the mast to provide high-power WiFi connectivity at a range of 12,000 feet (2.27 miles), to provide WiFi *to the parking lot*. (Rod. Dec. ¶ 9.) Server-ISP then sold its assets to Mr. Rodecker's new company Wisp.net ("WISP") and, in June 2017, WISP began serving customers off the premises. (Rod. Dec. ¶ 11.)

In October 2017, Rodecker-Slater installed additional antennas, including three Ubiquiti PowerBeam 500 AC ISO devices; one Ubiquiti Rocket AC 5Ghz Prism device; and one Rocket Dish RD-5G300-LW+ device to provide WiFi to customers in Southwest Fountain Valley. In December 2017, WISP added more radio devices to service additional off-site customers. (Rod. Dec. ¶ 12.)

Conditional Use Permit and Variance Hearing

Discovering that Rodecker-Slater was using the mast and attached facilities to receive and send signals to off-site customers, the City informed Mr. Rodecker that he must comply with the City's wireless ordinance.

Under the wireless ordinance, new freestanding wireless telecommunication facilities that are not collocated require a conditional use permit ("CUP"). (FVMC § 21.28.090.) To approve the CUP, the hearing body must find that the wireless facilities are consistent with the City's *general provisions* for wireless facilities and any applicable *special standards*; and will not *adversely impact* the surrounding area. (FVMC § 21.28.090(e)(2),(3).) The general provisions require all wireless facilities be screened, stealth, and located to minimize visibility. (FVMC § 21.28.040(g), (i), (j).) "A wireless facility that is not fully assimilated to its surroundings shall be prohibited." (FVMC § 21.28.040(j).) The special standards for roof-top wireless facilities require the facilities be screened, architecturally consistent, and not exceed the maximum zone height.

(FVMC § 21.28.060). The adverse impact review considers, among other factors, aesthetics. (*Sprint PCS Assets LLC v. City of Palos Verdes Estates* (9th Cir. 2009); see also *T-Mobile USA v. City of Anacortes* (9th Cir. 2009) "factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage" are legitimate concerns for a locality.)

Mr. Rodecker applied for Conditional Use Permit No. 1853 to operate a wireless hub and relay system on the roof of the existing building and Variance No. 329 to allow the mast supporting the hub and relay system to exceed the fifty-foot maximum height in the C1 zoning district. (Jenkins Dec. ¶ 5.) Two public hearings were held in front of the City Council. (Jenkins Dec. ¶ 6.) Evidence was presented that the wireless facility was not screened or stealth; not architecturally consistent with the building or his parcel; and was placed on the roof of an existing office building without approvals or building permits. (Jenkins Dec. ¶ 7.) Though required as part of the variance application to exceed the maximum height in the C1 district, Mr. Rodecker failed to provide evidence of unique circumstances applicable to the Slater property to support the findings required for granting the variance application. (Jenkins Dec. ¶ 8.) In fact, as noted in the staff reports, all commercial wireless facilities in the City have been approved at or below the maximum height in their respective zoning districts except for one (1) freestanding facility, which was approved at 55 feet to allow for collocation (CUP No. 1677). (Jenkins Dec. ¶ 8.) There are 40 wireless facilities in the City of Fountain Valley, consisting of stealth and non-stealth roof-top mounted facilities, Edison tower attached facilities, freestanding stealth monopines, stealth monopalms, and non-stealth freestanding monopoles. (Jenkins Dec. ¶ 8.) Since the first amendment to the City's wireless ordinance in 1997, which required all wireless facilities to be stealth, the Planning Commission has approved 27 stealth facilities. (Jenkins Dec. ¶ 8.) The remaining 13 non-stealth facilities were approved prior to the requirement that all wireless facilities be stealth. (Jenkins Dec. ¶ 8.)

Balancing aesthetics and federal preemption, the Council determined that Mr. Rodecker could maintain facilities necessary to provide wireless service to his building under OTARD but that his hub and relay facilities had to be removed because they were not protected, failed to comply with the City's wireless ordinance, and did not incorporate any features to conceal components of the wireless facility. (Jenkins Dec. ¶ 9.)

PROCEDURAL HISTORY

Rodecker-Slater filed the current Petition with the Federal Communications Commission seeking a determination that the denial of his request for a CUP and Variance for a hub and relay system that exceeds the maximum zoning height is pre-empted by OTARD. Because the Council allowed Rodecker-Slater to maintain facilities necessary to obtain wireless service at the Slater building, the issue is whether antennas and other facilities added for the purpose of serving off-site customers are protected by OTARD. They are not. Wireless facilities installed at a location for the purpose of serving off-site customers are subject to local zoning regulation under Section 332.

POINTS AND AUTHORITIES

Sections 207 and 332 of the Telecommunications Act of 1996 provide parallel systems for regulation of wireless telecommunication facilities.

Section 332 generally applies to wireless facilities installed by carriers. It provides for limited preemption of local regulation while preserving local authority over zoning, including aesthetic regulation, of wireless telecommunications facilities.

Section 207, on the other hand, addresses consumer-end wireless reception devices. Under Section 207, the Commission was to adopt rules that prohibit restrictions that impair a viewer's ability to receive video programming services via antenna. (47 U.S.C. § 303.) The rules adopted by the Commission pursuant to Section 207 are known as the over-the-air-reception-device or OTARD rules. (47 C.F.R. § 1.4000.)

The OTARD rules prohibit restrictions on property that impair the use of certain antennas. For OTARD to apply, an antenna must be installed "on property within the exclusive use or control of an antenna user where the user has a direct or indirect ownership or leasehold interest in the property" upon which the antenna is located. (47 C.F.R. 1.4000(a)(1).) Originally enacted to protect satellite dishes, the rules were modified in 2000 by the *Competitive Networks Order*[1] to apply to customer-end antennas serving customers on the premises that transmit and/or receive fixed wireless signals. In making the determination that OTARD applies to fixed wireless

[1] Promotion of Competitive Networks in Local Telecommunications Markets, *First Report and Order in WT Docket No. 99-217, the Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and the Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, 15 FCC Rcd. 22,983 (2000) (*Competitive Networks Order*)

signals, the Commission found that OTARD does not apply to hub or relay systems. (*Competitive Networks Order* ¶ 99.)

In the 2004 *Competitive Networks Reconsideration Order*,[2] Triton Network Systems ("Triton") sought reconsideration of the Commission's determination that customer-end antennas used as hubs or relays were excluded from OTARD. (*Competitive Networks Reconsideration Order* ¶ 13.) Triton deployed its networks using a "point-to-point" architecture where each customer's receiving device also served as a relay. (*Competitive Networks Reconsideration Order* ¶ 13.)

The Commission noted that Section 332(c)(7) of the Telecommunications Act preserves local authority over the placement of personal wireless facilities, not consumer-end antennas: "local authority is limited to those facilities used for the *provision* of 'personal wireless service'." (*Competitive Networks Reconsideration Order* ¶ 14.) "[T]he legislative history of section 332(c)(7) refers to non-customer-end equipment such as '50 foot towers' as an example of 'personal wireless service facilities'." (*Competitive Networks Reconsideration Order* ¶ 14.) "In enacting Section 332(c)(7), Congress expressed a concern with preserving for local governments the important role of zoning authority so that visible and potentially obtrusive facilities, such as towers, were constructed and located in a manner consistent with the interests of the local community." (*Competitive Networks Reconsideration Order* ¶ 15.)

Acknowledging local authority over hub and relay systems, in the case of a point-to-point system, where the consumer-end antenna performs both functions and shares the "same physical characteristics of other customer-end equipment, distinguished only by the additional functionality of routing service to additional users" the Commission did not believe its rules should serve to disadvantage more efficient technologies. (*Competitive Networks Reconsideration Order* ¶ 16.) The Commission cautioned, however, that:

> In concluding that OTARD protections should extend to such customer-end equipment, we do not intend that carriers may simply locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation. Rather, in order to invoke the protections of the OTARD rule, the equipment *must be installed in order to serve the customer on such premises,* and it must comply with all of the limitations of the rule, such as the restriction in antenna size to one meter or less in diameter or diagonal measurement.

[2] Promotion of Competitive Networks in Local Telecommunications Markets, *Order on Reconsideration*, WT Docket No. 99-217, 19 FCC Rcd 5637, 5643-44 ¶¶ 13-18 (2004) (*Competitive Networks Reconsideration Order*)

(emphasis in original) (*Competitive Networks Reconsideration Order* ¶ 17.)

The Commission then repeated its determination that OTARD did not apply to hub or relay systems in its 2006 Memorandum Opinion and Order on the *Petition of Continental Airlines*.[3] There, the Commission reasoned that, although it was preempting most state and local regulation of customer-end antennas, state and local regulation regarding the placement, construction and modification of "hub" antennas, which are used to transmit and/or receive signals from multiple customer locations and are not commonly located inside a customer premises, would continue to be governed under Section 332(c)(7). (*Petition of Continental Airlines* ¶ 5.)

In excluding hub and relay antennas, the Commission acknowledged the "rights of state and local governments under Section 332(c)(7) to regulate the placement, construction and modification of carrier hub sites" as personal wireless service facilities and made it clear that it was not seeking to circumvent those rights. (*Petition of Continental Airlines* ¶ 20.) While equipment possessing the additional functionality of routing service to additional users (i.e., point-to-point) receives protection under OTARD "so long as the equipment was '*installed in order to serve the customer on [its] premises'* " [emphasis in original], the Commission "cautioned that this clarification was not intended to allow carriers 'simply [to] locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate [Section 332(c)(7)-preserved] zoning regulation'." (*Petition of Continental Airlines* ¶ 20.)

The Commission ultimately found that Continental's WiFi system, installed in its frequent flyer lounge for use of passengers and employees, was not a hub and relay because the "use of an antenna to route signals strictly within an antenna user's premises does not constitute use of the antenna as a hub for distribution of services. When a leaseholder or property owner uses an antenna to send and receive signals strictly within its premises, and not to 'multiple customer locations,' the antenna user is using the antenna for its own purposes under the OTARD rules." (*Petition of Continental Airlines* ¶ 21.)

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[3] *Petition of Continental Airlines for a Declaratory Ruling,* ET Docket No. 05-247, filed July 8, 2005; Supplement to Petition of Continental Airlines, Inc., for a Declaratory Ruling, ET Docket No. 05-247, filed July 27, 2005 (*Petition of Continental Airlines*).

ARGUMENT

Mr. Rodecker's declaration contradicts any argument that his wireless facilities are used to send and receive signals strictly within his premises. His facilities are used to receive and send signals to WISP customer locations throughout the City. OTARD protects consumer-end antennas, not 40-foot hub and relay systems. "[T]he legislative history of section 332(c)(7) refers to non-customer-end equipment such as '50 foot towers' as an example of 'personal wireless service facilities'." (*Competitive Networks Reconsideration Order* ¶ 14.) "In enacting Section 332(c)(7), Congress expressed a concern with preserving for local governments the important role of zoning authority so that visible and potentially obtrusive facilities, such as towers, were constructed and located in a manner consistent with the interests of the local community." (*Competitive Networks Reconsideration Order* ¶ 15.) Yet, though an array of complex, multi-party transactions, Mr. Rodecker has installed a 40-foot, 3-post Rohn tower with a multitude of high-power, high-range antennas.

Further, to be protected, "the equipment *must be installed in order to serve the customer on such premises*." Mr. Rodecker's declaration details how, in October 2017, Rodecker-Slater installed three Ubiquiti PowerBeam 500 AC ISO devices; one Ubiquiti Rocket AC 5Ghz Prism device; and one Rocket Dish RD-5G300-LW+ device to provide WiFi to customers in Southwest Fountain Valley and, in December, WISP added more radio devices to service additional customers throughout the City. (Rod. Dec. ¶ 12.)

Carriers cannot "simply locate their hub-sites on the premises of a customer in order to avoid compliance with a legitimate zoning regulation." That is what Rodecker-Slater has done here. Mr. Rodecker states that in April 2017, Server-ISP purchased and installed an Ubiquiti AM-M-V5G-Ti radio on the mast to provide high-power WiFi connectivity at a range of 12,000 feet (2.27 miles) to provide WiFi to the *parking lot*. Despite the relative necessity of a high-powered antenna to provide service to the parking lot, two months later WISP began serving customers off the premises. (Rod. Dec. ¶ 11.)

CONCLUSION

Mr. Rodecker's facilities evolved through a highly complex set of business transactions conducted over the course of several years for the purpose of serving as a for-profit wireless provider. Mr. Rodecker, and Rodecker-Slater, are not consumers seeking wireless service at the

Slater building. They, and Mr. Rodecker's other companies, are looking to serve as a wireless provider and, as such, are subject to the City's legitimate zoning regulations in the same manner as all the other wireless providers across the City.

Respectfully Submitted:

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Attorney for Respondent
City of Fountain Valley

DECLARATION OF MATT JENKINS

I, Matt Jenkins, declare as follows:

1. I am over the age of eighteen and am currently, and have been since 2008, employed in the Planning Department at the City of Fountain Valley. My current position is Senior Planner.

2. I was the lead Planning employee tasked with processing Mr. Rodecker or Rodecker-Slater's request for a conditional use permit and variance.

3. I have personally been to the Slater Avenue Building at the center of the Petition and I have personally viewed Mr. Rodecker's wireless facilities from the ground level. In fact, his building is directly across the street from City Hall and I am able to view it and the wireless facilities on a regular basis.

4. Rodecker-Slater's facility is located on the roof of an existing two-story office building. The mast support on top of the roof is a 3-post, 40-foot tall (according to information from David Rodecker), triangular-shaped, metal Rohn tower supported by three (3) Guy lines. From ground level, the tower reaches a height of 68 feet. The tower has seven (7) antennas and dishes installed at the top and is highly visible from the public streets. Attached as Exhibit 1 are photographs that truly and accurately reflect the current visible condition of the wireless facilities as I have personally viewed them.

5. Mr. Rodecker applied for Conditional Use Permit No. 1853 to operate a wireless hub and relay system on the roof of the existing building and Variance No. 329 to allow the mast supporting the hub and relay system to exceed the fifty-foot maximum height in the C1 zoning district.

6. Two public hearings were held in front of the City Council and I was present at both. Before the Council hearings, the matter had been considered by the Planning Commission where it was approved but then appealed by the Council.

7. Evidence was presented during the Council hearings that the wireless facility was not screened or stealth; not architecturally consistent with the building or his parcel; and was placed on the roof of an existing office building without approvals or permits.

8. During the hearings, Mr. Rodecker failed to show sufficient evidence of unique circumstances applicable to his Slater Avenue property to support the findings required for granting the variance application. As noted in the staff reports, all commercial wireless facilities in the City have been approved at or below the maximum height in their respective zoning districts except for one (1) freestanding facility, which was approved at 55 feet to allow for collocation (CUP No. 1677). There are 40 wireless facilities in the City of Fountain Valley, consisting of stealth and non-stealth roof-top mounted facilities, Edison tower attached facilities, freestanding stealth monopines, stealth monopalms, and non-stealth freestanding monopoles. I am informed and believe from my review of City records, that since the first amendment to the City's wireless ordinance in 1997, which required all wireless facilities to be stealth, the Planning Commission has approved 27 stealth facilities. The remaining 13 non-stealth facilities were approved prior to the requirement that all wireless facilities be stealth.

9. The Council denied Mr. Rodecker's request for a conditional use permit and variance but Mr. Rodecker was allowed to maintain facilities necessary to provide wireless service to his building under OTARD. Mr. Rodecker's hub and relay facilities had to be removed because they were not protected, failed to comply with the City's wireless ordinance, and did not incorporate any features to conceal components of the wireless facility. I am informed and believe that a letter dated July 24, 2019 was sent by Planning Director Brian James informing Mr. Rodecker of the same.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 18, 2019

Matt Jenkins
Declarant

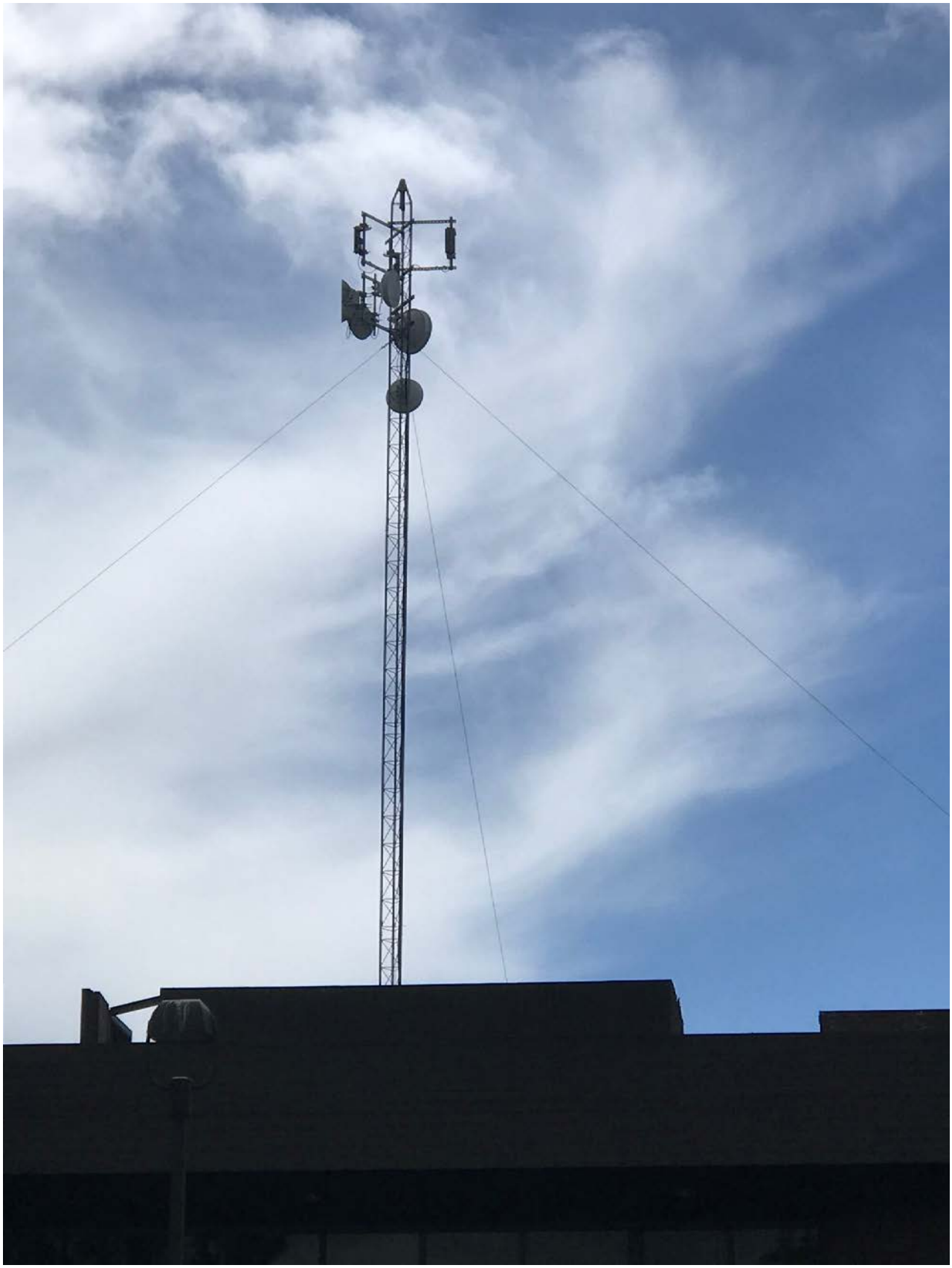
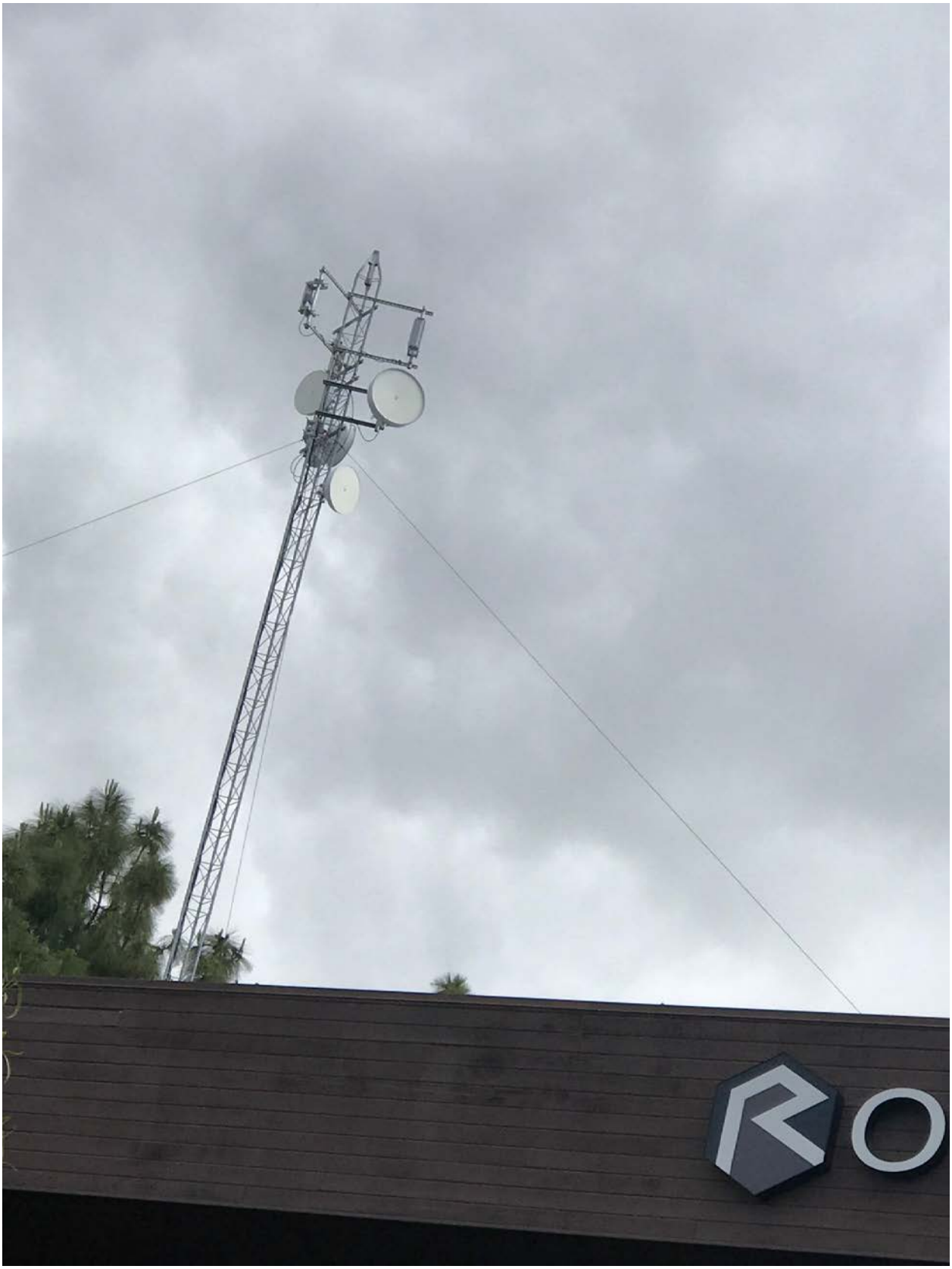


Exhibit 1



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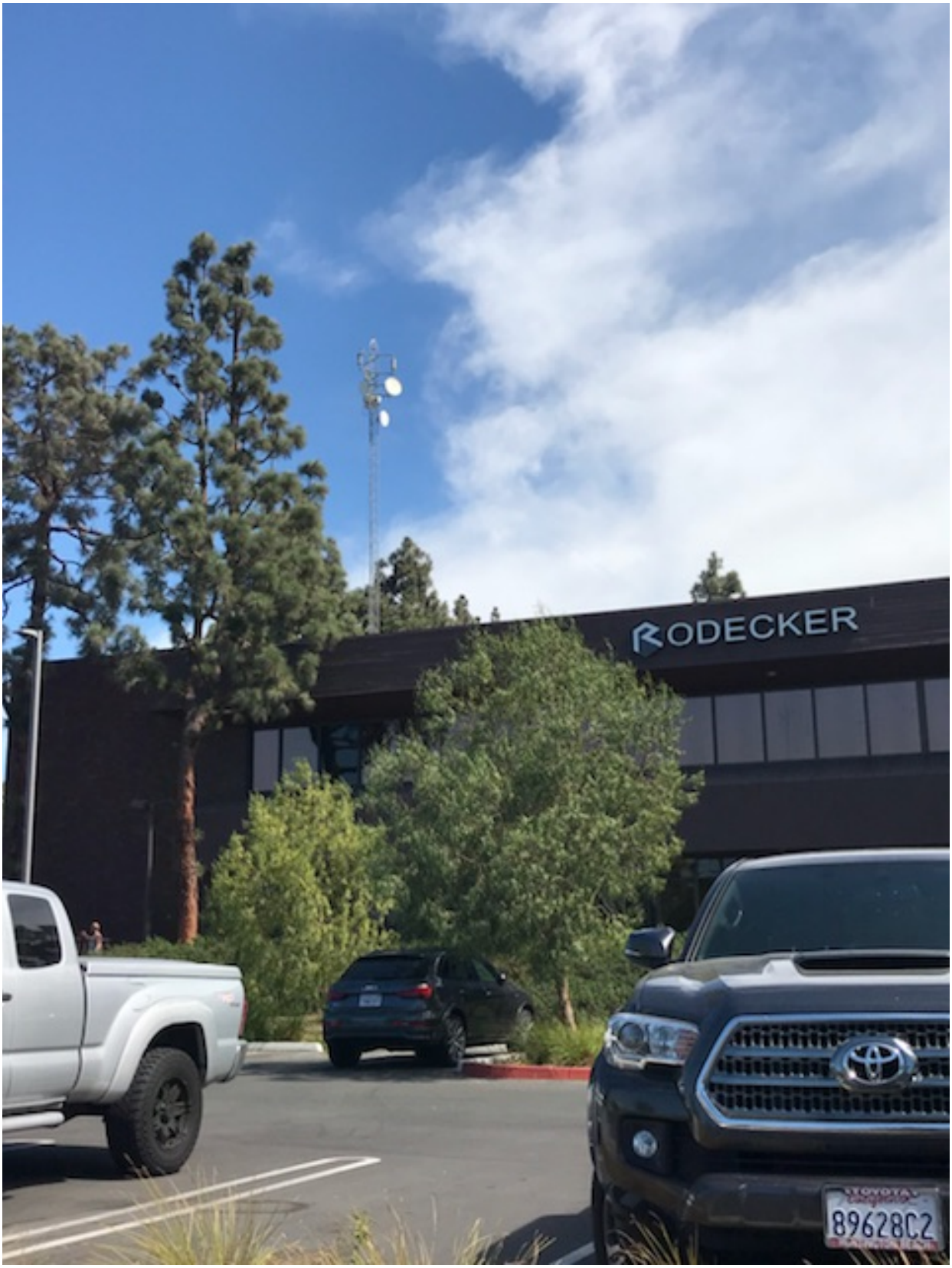

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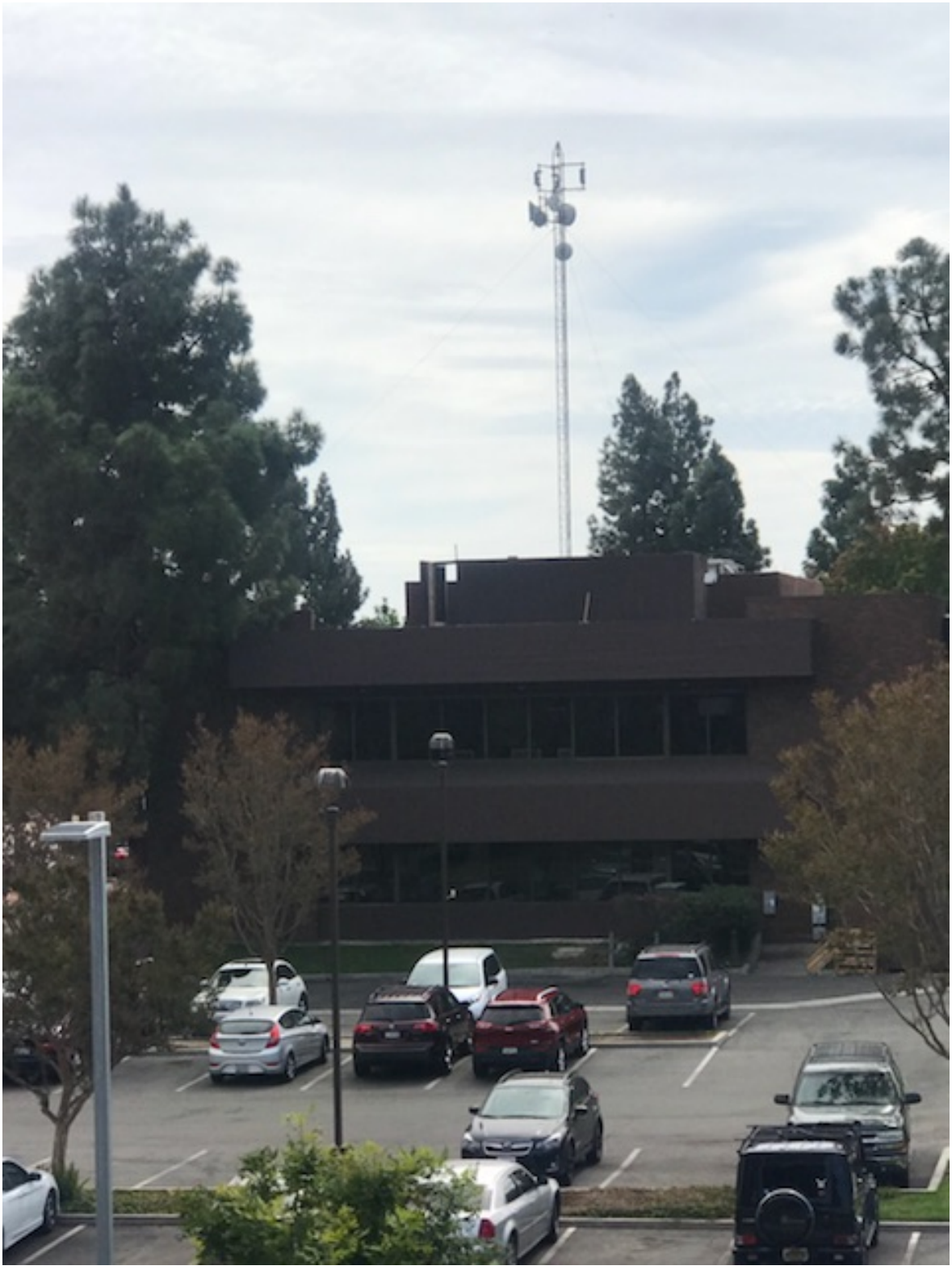

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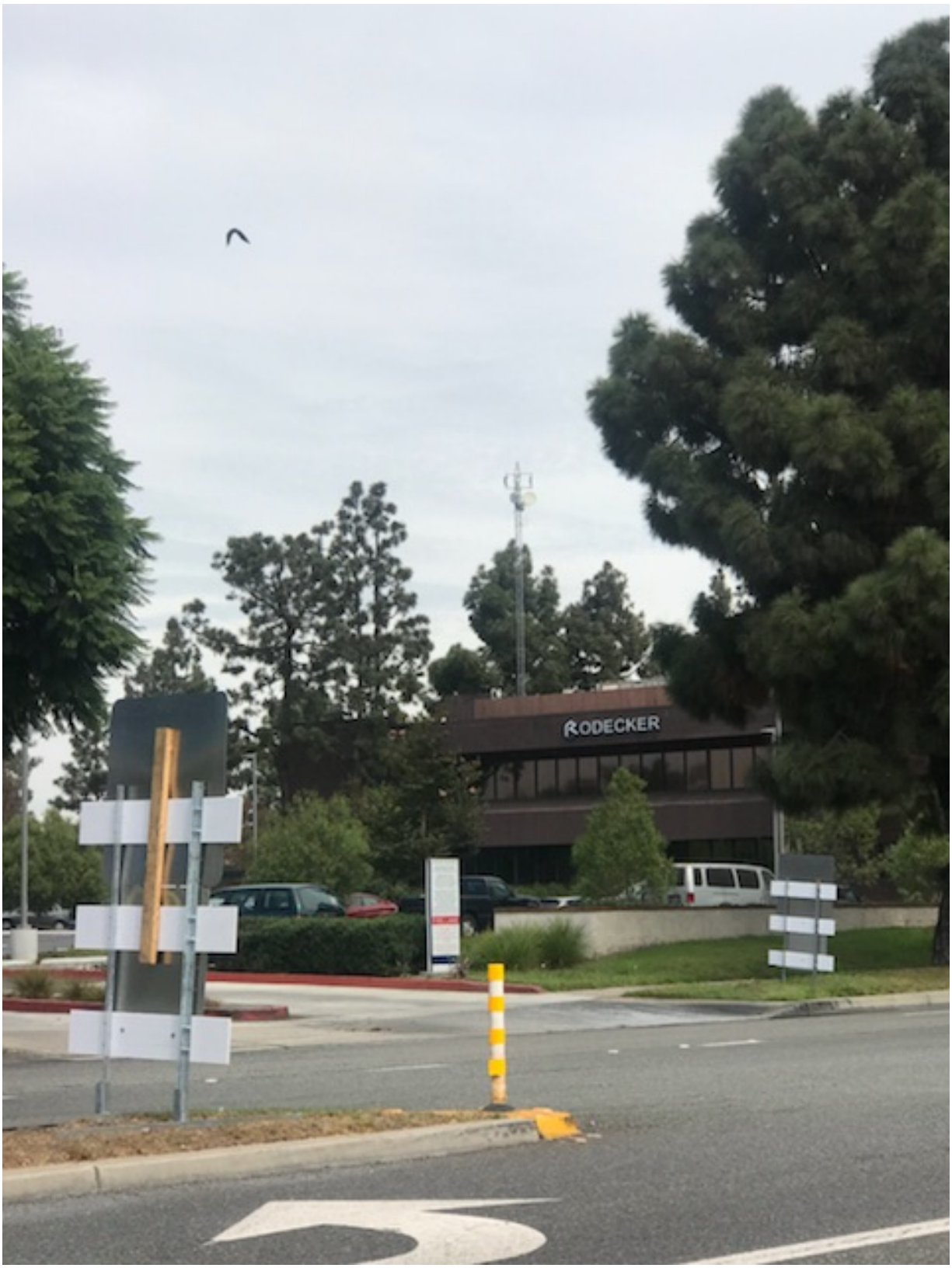

Exhibit 1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, Lindsey Orellana, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 453 South Glassell Street, Orange, California 92866.

On October 18, 2019, I caused to be served a copy of the foregoing document(s) described as **CITY OF FOUNTAIN VALLEY'S COMMENTS TO PETITION FOR DECLARATORY RULING** on the interested parties, in this action as follows:

Carl E. Kandutsch
The Carl Kandutsch Law Office
2520 K Avenue, Suite 700-760
Plano, Texas 75074

X (BY REGULAR MAIL) I mailed a copy by enclosing it in a sealed envelope with postage fully prepaid. I am readily familiar with the firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, pursuant to which practice the correspondence will be deposited with the U.S. Postal Service this same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in the affidavit.

__ (BY FEDERAL EXPRESS) The package was Federal Expressed (Pre-paid - Next Day Service - Authorization to Leave at Location without Obtaining a Signature). I am readily familiar with the firm's practice of collection and processing documentation for Federal Express. The package was deposited at the prearranged Federal Express location in the ordinary course of business.

__ (BY PERSONAL SERVICE) ( ) I delivered by hand or ( ) I caused to be delivered via messenger service, such envelope to the offices of the addressee(s) with delivery time prior to 5:00 p.m. ( ) on the date specified above or ( ) on or before _____.

__ (BY EMAIL) I e-mailed such documents to the aforementioned person(s).

X (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 18, 2019, at Orange, California.

Lindsey S. Orellana

Lindsey Orellana